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In the Supreme Court of the United States

OCTOBER TERM, 1960

BRUNO BLAZINA, PETITIONER

v.

E. P. BOUCHARD, District Director of Immigration and Naturalization Service, New Jersey

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 9-17) is reported at 286 F. 2d 507. The order of the district court (Pet. 8) is not reported.

JURISDICTION

The judgment of the court of appeals was filed on February 2, 1961. The petition for a writ of certi-

orari was filed on May 3, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, who is a deportable Yugoslav seaman, applied for a stay of deportation under Section 243 (h) of the Immigration and Nationality Act of 1952 on the ground of physical persecution. The Attorney General denied the application. The question presented is whether the court of appeals properly refused to overturn this refusal to grant discretionary relief.

STATUTE AND REGULATION INVOLVED

Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253, 66 Stat. 214, provides:

> (h) *Withholding of deportation*
>
> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.

8 C.F.R. (1958 ed.) 243.3(b) provides:

> (b) *Stay of deportation*
>
> * * * *
>
> (2) If the request for a stay of deportation is predicated upon a claim by the alien that he would be subject to physical persecution if deported to the country designated by the Service, he shall be requested, upon notice, to appear

before a special inquiry officer for interrogation under oath. The alien may have present with him, at his own expense, during the interrogation any attorney or representative authorized to practice before the Service. The alien may submit any evidence in support of his claim which he believes should be considered by the special inquiry officer. Upon completion of the interrogation, the special inquiry officer shall prepare a written memorandum of his findings and a recommendation which shall be forwarded to the regional commissioner together with all the evidence and information submitted by the alien or which may be applicable to the case. The alien shall be served with a copy of the special inquiry officer's memorandum and recommendation and shall be allowed five days from date of service within which to submit written representations to the regional commissioner. If the alien refuses to appear for interrogation before a special inquiry officer when requested to do so or waives his appearance, all the pertinent evidence and available information in the case shall immediately be submitted to the regional commissioner. The decision whether to withhold deportation and, if so, for what period of time shall be finally made by the regional commissioner upon consideration of all the evidence submitted by the alien and any other pertinent evidence or available information.

* * * *

STATEMENT

Petitioner, a 23-year-old single male, is a native and citizen of Yugoslavia (R. 30a-31a). He entered the United States on August 19, 1957, as a non-immi-

grant seaman pursuant to 8 U.S.C. 1282, which provides for conditional permits to land for a period not exceeding 29 days. On December 19, 1957, after petitioner had remained in this country longer than permitted, he was ordered to appear and show cause why he should not be deported (R. 29a). Petitioner was found deportable and was granted the right of voluntary departure subject to the condition that he would be deported if he did not depart within the specified time (Pet. 10). Petitioner did not leave this country within the specified time and the order of deportation became effective (R. 29a).

On January 27, 1958, petitioner applied for a stay of deportation under Section 243(h) of the Immigration and Nationality Act, *supra*, p. 2, alleging that if returned to Yugoslavia he would be "persecuted and prosecuted" because of his Roman Catholic faith, his belief in capitalism, and his disagreement with the communistic principles in force in that country (Pet. 10).

On November 26, 1958, an inquiry was held before a special inquiry officer (see 8 C.F.R. 243.3(b)(2), *supra*, pp. 2-3). Petitioner appearing with counsel of his choice, testified that he was a Roman Catholic and that he faithfully followed the tenets and principles of that faith (R. 31a-32a); that in Yugoslavia one who is a Roman Catholic "has complications" in his work and is "looked down upon" (Pet. 10-11; R. 32a, 34a); that government employees do not have freedom of worship in Yugoslavia (R. 33a). He further testified that he did not believe in the type of government in force in Yugoslavia (R. 34a, 36a), and that if he

were returned to Yugoslavia he would be jailed for three months "[b]ecause [he] fled from Yugoslavia, and those who do that are punished" (R. 35a). Questioning by the special inquiry officer elicited that petitioner had not been politically active or openly anti-communist while in Yugoslavia (R. 37a-38a); that neither he nor his family were ever physically harmed in any way (R. 38a); and that the sole reason petitioner felt he would be persecuted was the fact that he had fled and that his flight communicated a disapproval of the Communist government in Yugoslavia (R. 36a).

On the basis of this testimony, the special inquiry officer determined that petitioner had not shown danger of physical persecution because of his religious or political views, and recommended denial of the application. On December 31, 1958, the Regional Commissioner ordered that the application be denied (Pet. 13).

On September 25, 1959, petitioner filed an action in the District Court for the District of New Jersey challenging the denial of his application as arbitrary and seeking an injunction against his deportation (R. 3a-5a). The district court held that petitioner came within the purview of Section 243(h) and granted the injunction restraining his deportation (R. 26a-27a). The court did not state that the Regional Commissioner had abused his discretion but rather that it saw the facts "in a different light" (R. 27a).[1] On

[1] The court stated: "You know it is a case where I told you once before even judges have been known to disagree. And I am not in disagreement with the judge who decided that case, but I simply see the facts in a different light" (R. 27a).

appeal, the judgment of the district court was reversed. The court of appeals held that the district court, "in substituting its judgment for that of the administrative officers, was clearly in error" (Pet. 15). As to petitioner's claim that his enlistment in the United States Army (which occurred while the appeal was pending) added a new factor, the court of appeals noted that this consideration manifestly had not been before the Attorney General and indicated that petitioner should be permitted to file a new application under Section 243(h) (Pet. 17). We are informed that such an application has been filed and is scheduled to be heard in June.

ARGUMENT

Petitioner has been adjudged a deportable alien and he does not deny the correctness of this administrative determination. In his action brought in the district court, he challenged only the refusal of the Attorney General to grant him relief under Section 243(h) of the Immigration and Nationality Act of 1952, *supra*, p. 2, on the ground that he would be subjected to physical persecution if he returned to Yugoslavia.

The proceeding under Section 243(h) is completely unrelated to the issue of the alien's right to remain in the United States. Instead, relief under Section 243(h) is a privilege to be granted a deportable alien when, in the "opinion" of the Attorney General, deportation would subject the alien to physical persecution. The legislative intent to grant in Section 243(h) the broadest possible discretion to the Attorney

General is apparent when that section is compared with its predecessor, Section 23 of the Internal Security Act of 1950, 64 Stat. 1010. That provision required withholding the deportation of any alien to a country which the Attorney General found would subject him to physical persecution. The present statute, instead of requiring that such an alien not be deported, states that "[t]he Attorney General is authorized to withhold deportation" when "in his opinion" physical persecution would be the result. In other words, the power to relax the deportation provisions on the ground of physical persecution is given to the Attorney General to be exercised by him according to his own best judgment. This judgment is necessarily based upon the knowledge he acquires through governmental channels as to political conditions in a particular country and by the particular facts of each individual case. *United States ex rel. Moon* v. *Shaughnessy*, 218 F. 2d 316 (C.A. 2); *United States ex rel. Dolenz* v. *Shaughnessy*, 200 F. 2d 288 (C.A. 2), certiorari denied, 345 U.S. 928; *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F. 2d 392 (C.A. 2).

In view of the broad discretion given by Section 243(h) to the Attorney General, the court of appeals properly held that the district court was not warranted in reversing the Regional Commissioner's decision because it saw the "facts in a different light" (R. 27a). While a court may examine a record to determine whether discretion has been abused, Congress has given it no power to substitute its own judgment for that of the Attorney General or his representative. *Chao-Ling Wang* v. *Pilliod*, 285 F. 2d 517, 519-

520 (C.A. 7); *Obrenovic* v. *Pilliod*, 282 F. 2d 874, 876 (C.A. 7); *United States ex rel. Cantisani* v. *Holton*, 248 F. 2d 737, 738-739 (C.A. 7), certiorari denied, 356 U.S. 932; *United States ex rel. Dolenz* v. *Shaughnessy*, *supra*, 200 F. 2d at 291; *Sunjka* v. *Esperdy*, 182 F. Supp. 599, 601 (S.D. N.Y.); affirmed, April 13, 1960 (C.A. 2), certiorari denied *sub nom. Roncevich* v. *Esperdy*, 364 U.S. 815.

The record here supports the Attorney General's determination that petitioner had not established a sufficient basis for his claim that he would be subject to physical persecution if he returned to Yugoslavia. Petitioner's evidence, viewed in the light most favorable to him, shows only that he, as a Roman Catholic, would be "looked down upon" and have "complications" in his work (R. 32a, 34a). Moreover, the fact that he was neither politically active nor a lay leader in his religion militates against his claim of danger of physical persecution. *Batistic* v. *Pilliod*, 286 F. 2d 268, 269 (C.A. 7), petition for a writ of certiorari pending, No. 894, this Term; *Lardas* v. *Holland*, 235 F. 2d 955, 957 (C.A. 3); see *United States ex rel. Miletic* v. *District Director*, 108 F. Supp. 719, 720 (S.D. N.Y.). Petitioner alleged that if returned to Yugoslavia he will face a three-months prison sentence. This sentence, however, would be based not on his religious or political beliefs, but on the fact that he deserted his ship (R. 35a). Punishment for the crime of desertion is not the physical persecution contemplated in Section 243(h) of the Immigration and Nationality Act. *United States ex rel. Miletic* v. *District Director*, *supra*, 108 F. Supp. at 720.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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